October 25, 1982

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

CASE OF: [redacted]

This is an appeal to the Board of Appellate Review from an administrative determination of the Department of State that appellant, [redacted], expatriated himself on November 17, 1959, under the provisions of section 349(a)(6) of the Immigration and Nationality Act by making a formal renunciation of his United States citizenship before a consular officer of the United States at Melbourne, Australia. 1/ [redacted] took this appeal twenty-two years after he performed the statutory expatriating act.

I

Appellant [redacted] was born in [redacted] in [redacted]. His father was a native-born citizen of the United States; his mother, a citizen of Australia. Through his father,

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1/ Section 349(a)(6) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(6), provided:

> From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> . . .
>
> (6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

/Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, renumbered section 349(a)(6) of the Immigration and Nationality Act as section 349(a)(5).7

appellant acquired United States citizenship at birth under section 1993 of the Revised Statutes of the United States, as amended by the Act of May 24, 1934. Under that section, a person born abroad of one United States citizen parent and one alien parent became a citizen of the United States at birth, subject to certain U.S. residency requirements. 2/ Section 1993 of the Revised Statutes, as amended, was repealed by section 504 of the Nationality Act of 1940 (54 Stat. 1137.)

2/ Section 1, Act of May 24, 1934, 48 Stat. 797, amended Section 1993 of the Revised Statutes to read as follows:

Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides 'therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

From birth to 1952 W[redacted] was subject to the citizenship retention provisions of section 1993 and section 201(g) of the Nationality Act of 1940. When he was fifteen years of age, however, he came under the retention provisions of section 301(b) of the Immigration and Nationality Act of 1952. 3/ Under section 301(b), he would cease to remain a citizen of the United States unless he came to the United States to reside before his twenty-third birthday, March 22, 1960.

3/ Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401, prior to an amendment in 1972, a/ provided:

> Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

a/ Public Law 92-584 (Oct. 27, 1972, 86 Stat. 1289) amended these provisions by re-writing subsection (b) to provide for only a two-year residency requirement.

/Public Law 95-432, approved October 10, 1978, 92 Stat. 1046, repealed subsection (b) of section 301 7

Appellant was issued a United States passport by the Consulate General at Melbourne in 1954 and again in 1958. The record shows that his 1958 passport was limited to expire on March 21, 1960, the eve of his twenty-third birthday, in conformity with the citizenship retention provisions of section 301(b) of the Immigration and Nationality Act.

In his passport application of December 3, 1958, appellant stated that he intended to return to the United States within three months to reside permanently and that he had booked passage to the United States on the ship Monterey, leaving Sydney on February 4, 1959.

The record shows no further contact between appellant and the Consulate General until November 17, 1959, when he executed an oath of renunciation of United States citizenship before a consular officer in the form prescribed by the Secretary of State. On December 1, 1959, the Consulate General, as required by section 358 of the Immigration and Nationality Act, prepared a certificate of loss of nationality in appellant's name. 4/

4/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of part III of this subchapter, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

The Consulate General certified that J[redacted] F[redacted] M[redacted] W[redacted] was born at M[redacted], V[redacted], A[redacted], on [redacted] that he acquired the nationality of the United States by virtue of birth to a native-born American citizen father; that he expatriated himself on November 17, 1959, under the provisions of section 349(a) (6) of the Immigration and Nationality Act by making a formal renunciation of nationality before a consular officer at Melbourne.

There is no official account in the record of what transpired on or immediately prior to November 17, 1959, which would shed light on the circumstances under which appellant executed the oath of renunciation. Nor is there any indication whether the Consulate General even prepared a report of appellant's visit that day. On December 2, 1959, the Consulate General by operations memorandum forwarded the certificate of loss of nationality and appellant's oath of renunciation to the Department without any accompanying explanation.

Appellant has submitted no contemporary account of his own about what transpired on the day he renounced his citizenship. He did, however, submit a sworn statement dated June 15, 1981, in which he endeavors to describe why he signed the oath of renunciation. He declared:

> Shortly after my 21st birthday and prior to my marriage in 1959, I went to the American Consul to get permission for my fiancee to come to the United States on a visit. At that time I desired to take my fiancee to the United States for a visit and determine after she had seen the United States if we should live in the United States permanently.
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> The American Consul refused to issue a visitor's visa to my fiancee and advised me that I had to decide if I wanted to remain an Australian or become a citizen of the United States. If I wanted my fiancee to go to the United States, she would have to go after our marriage as an immigrant. My fiancee (soon to be wife) was not willing to go to the United States as

an immigrant, never having been there; and since the Consul was forcing me to make an election, I stayed in Australia with my wife and assumed that I had lost my United States citizenship.

N E W , whom appellant married on (they were in also submitted an affidavit dated April 28, 1982, in which she undertakes, hardly more precisely than W , to corroborate appellant's recollection of what transpired on November 17, 1959. She stated in part:

> 3. . .I recall that I was advised ~~/~~at the Consulate General at Melbourne/ that I could not obtain entry to the United States and remain there for any length of time without making an application for citizenship.
>
> 4. AS /sic/ I had lived all my life in Australia, I was not prepared to make such an application without first visiting the United States and making some assessment of my wish to live there, or not.
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> 5. I further recall that there was a somewhat heated exchange between the Applicant /sic/ and the Consul Official as a result of the information I was given and further that the Applicant was then advised that unless he was prepared to surrender his passport, I would not be able to obtain entry to the United States as a visitor.
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> 6. THE /sic/ Applicant was most upset at the time and-the conversation which he participated in with the Consul could only be described as acrimonious.
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> 7. I recall that the Applicant was very concerned as a result of the information I was given and, as we were both very young at the time, we felt that we had no alternative but to submit to the

> Consul's requirements, although this was contrary to what the Applicant wanted.

The Department approved the certificate of loss of nationality on January 15, **1960.** Three months later, after the Consulate General had inquired about the status of the certificate, the Department by operations memorandum dated March **23, 1960,** and marked "Urgent Air Priority", forwarded a copy of the approved certificate to the Consulate General. On April **4, 1960,** the Consulate General acknowledged receipt of the Department's operations memorandum. There is, however, no evidence of record to show whether the Consulate General forwarded a copy of the approved certificate to appellant, or if it did, whether he received it.

It should be noted, however, that on the back of appellant's certificate of loss of nationality the procedure for disposition of the certificate is spelled out. 5/

> The certificate should be executed in quadruplicate. Three copies thereof should be sent to the Department, one of which will be the original, and one should be retained in the files of the office in which it was executed. If the certificate is approved by the Department, approval will be shown by means of a stamp endorsement on each of the three copies signed by an appropriate officer of the Passport Division. The Department will then return one copy to

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5/ In its brief, the Department incorrectly quotes the notation on the back of the certificate which was issued in appellant's name. The quotation given by the Department is from the form of certificate used at a later date.

> the Foreign Service office at which the certificate was issued. Upon receipt of the approved copy of the certificate, the copy retained by the Foreign Service office will be delivered to the expatriate after the Foreign Service Officer has made a notation thereon that the certificate has been approved by the Department under the date of the stamp endorsement.

This procedure is in conformity with the statutory requirements for notification to the expatriate of approval of a certificate of loss of nationality set forth in section 358 of the Immigration and Nationality Act. 6/

There is no further record of any contact between appellant and any U.S. consular or diplomatic establishment for the next twenty-one years until June 15, 1981, when he applied for a United States passport at the office of the State Department Agent at San Francisco. In his affidavit of June 15, 1981, appellant stated that: "I have taken may /sic - many?/ trips to the United States commencing in 1938; however, after 1959 none of my trips were as a citizen of the United States." In a citizenship questionnaire also executed on June 15, 1981, in connection with his passport application, appellant stated that his trips to the United States had been on an Australian passport with non-immigrant visas. The fact that he had twenty-two years earlier performed an unequivocal act of expatriation seems to have faded from his memory. In response to a yes-or-no question in the citizenship questionnaire: "Have you ever renounced U.S. nationality at a U.S. consulate or embassy", appellant circled "no."

6/ See note 4, supra.

On October 22, 1981, the Associate Director for Passport Services of the Department informed appellant that because the Department's records showed that he made a formal renunciation of his United States citizenship on November 17, 1959, at the Consulate General at Melbourne, and it had been determined in 1960 that he was no longer a United States citizen, his application for a passport had been denied.

By letter from his attorney, dated November 4, 1981, appellant took an appeal to this Board, 7/

In his reply brief counsel for appellant contends that the Department's determination of loss of W[redacted] United States citizenship is contrary to law or fact because:

-- he was denied due process because he did not receive notice of the Department's approval of the certificate of loss of nationality, and that the Department bears the burden of proving that he had received notice;

-- the Consul's actions which forced him into renouncing his citizenship amounted to duress and therefore rendered his renunciation involuntary:

-- he did not intend to relinquish his citizenship.

Counsel argues that in the circumstances of this case the Board should consider the merits of the appeal and not be precluded therefrom by the technical jurisdictional issue of whether the appeal was timely filed according to the applicable regulations.

7/ Appellant's counsel informed the Board of Appellate Review on December 1, 1981, that appellant did not intend to submit a legal brief in support of the appeal.

II

The threshold question presented by this case is whether the Board has jurisdiction to entertain the appeal of W[redacted].

This being an appeal from an administrative determination of the Department of State of loss of citizenship, the Board clearly has jurisdiction over the subject matter, pursuant to section 7.3 of Title 22 of the Code of Federal Regulations (22 CFR 7.3), provided the appeal was taken within the time limit stipulated by the applicable regulations. If the appeal was not taken within the required time limit, the appeal is time barred, and the Board lacks jurisdiction to entertain it.

In 1960 when the Department approved the certificate of loss of nationality in appellant's name the Board of Appellate Review did not exist. At that time there was in existence a Board of Review of Loss of Nationality in the then Passport Division of the Department of State. That Board had jurisdiction over all cases where the Secretary of State had made an administrative determination of loss of United States citizenship or nationality which had occurred under laws administered by the Secretary of State or authorized by the Secretary of State. Prior to 1966 no prescribed time limit on taking an appeal from an administrative determination of loss of United States citizenship was specified in the rules of procedure of the Board of Review.

The first mention of a time limit on entering an appeal from a determination of loss of nationality appeared in the regulations of the Department promulgated on October 30, 1966, with respect to the Board of Review of Loss of Nationality within the Passport Division. The regulations provided that an appeal to the Board of

Review on Loss of Nationality be made "within a reasonable time." 8/ This "reasonable time" provision was adopted in the Department's regulations 9/ promulgated in **1967** for the then newly established Board of Appellate Review and remained in effect until the regulations were revised and amended on Navember **30, 1979.**

The current revised regulations, which require that an appeal be filed within one year after approval of the certificate of loss of nationality, were of course not in force in **1960** when the Department approved the certificate in this case. Believing that the current regulation as to the time limit on appeal should not apply retrospectively, we are of the view that the Department's regulations on time limitation which were in effect prior to November 30, **1979,** should govern.

8/ Section **50.60,** Title 22, Code of Federal Regulations (1966), 22 CFR **50.60, 31** Fed. Reg. **13539 (1966).**

9/ Section **50.60,** Title **22,** Code of Federal Regulations (1967-1979), 22 CFR **50.60,** provided:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review,

Under the reasonable time provision, a person who contends that the Department's determination of loss of nationality is contrary to law or fact must file his request for review within a reasonable time after he has received notice of such determination. Accordingly, if a person did not initiate his or her appeal to the Board within a reasonable time after notice of the Department's determination of loss of nationality, the appeal would be time barred and the Board would lack jurisdiction to consider it. In brief, the reasonable time provision presents a jurisdictional question. 10/

Counsel argues that appellant did not receive notice that the Department had approved a certificate of loss of nationality in [redacted] name until 1981 when appellant was informed by [redacted] ment that his application for a passport had been denied on the grounds that he was no longer a United States citizen. Counsel further contends that the failure of the Department to give appellant notice in 1960 or anytime thereafter until 1981 was a denial of due process, and that any delay on the part of appellant in not taking an appeal until 1981 should not, in the circumstances of this case, be considered unreasonable.

Before considering whether the instant appeal was taken within a reasonable time, we must establish whether appellant had any kind of notice of the loss, or probable loss, of his citizenship prior to 1981, and if so at what point in time.

10/ The Attorney General in an opinion rendered in the citizenship case of Claude Cartier in 1973 stated:

> The Secretary of State did not confer upon the Board the power to adjudicate collateral attacks nor to review actions taken long ago. 22 C.F.R. 50.60, the jurisdictional basis of the Board, requires specifically that the appeal to the Board be made within a reasonable time after the receipt of a notice from the State Department of an administrative holding of loss of nationality or expatriation.

Office of Attorney General, Washington, D.C. File: CO-349-P, February 7, 1972.

Because of the passage of time and the absence in the record of a receipt acknowledging appellant's acceptance of delivery of a copy of the approved certificate, it is impossible to know with certainty what actually transpired in **1960**. We have seen, however, that on March **23, 1960,** the Department duly complied with section **358** of the Immigration and Nationality Act by sending a copy of the approved certificate to the Consulate General at Melbourne, and that the Consulate General on April **4, 1960,** acknowledged receipt thereof. The Department argues that it may be presumed the Consulate General duly forwarded a copy of the approved certificate to appellant. The Department ob[redacted] the Departmental regulations at the time of W[redacted] renunciation (printed on the back of the certificate of loss of nationality) provided that a copy of the approved certificate "will be delivered to the expatriate after the Foreign Service Officer has made a notation thereon that the certificate has been approved...." There is no evidence, the Department argues, that this was not done, and in the absence of evidence that the consul did not comply with the instruction, it should be presumed that he did so. The Department cites Boissonas v. Acheson, 101 F. Supp, **138 (1951)** and Webster v. Estelle, **505** F. 2d **926 (1974)** in support of this position.

It would, in our view, be unprofitable to speculate as to what may or may not have occurred in **1960**. The true facts are probably now unknowable. The issue of appellant's receipt or non-receipt of notice of the Department's determination of loss of his citizenship is therefore moot.

The relevant inquiry is whether appellant had notice other than actual notice of the loss of his citizenship and if so whether such notice was legally sufficient to give him knowledge thereof. Appellant's unsupported allegation that he did not have actual notice of the Department's determination of loss of his citizenship until he received the Department's letter of October **22, 1981,** denying his passport application may not excuse him from failing to take a timely appeal if he was, or may reasonably be deemed to have been, aware that he was an expatriate, or at least that there existed a substantial question about his citizenship status.

If we find that W[redacted] did not have sufficient notice of his loss or probable loss of citizenship until 1981, his appeal may be deemed to have been timely filed, and the Board will. have jurisdiction to consider it on the

merits. If, however, we conclude that W [redacted] had implied notice of the loss of his citizenship, the question remains whether the date on which he is considered to have had such notice was so remote from the date on which he actually appealed that his delay was unreasonable, and the appeal accordingly should be time barred.

It is well established that implied notice of a fact may be legally sufficient to impute actual notice to a party.

Implied notice is a presumption of fact relating to what one can learn by reasonable inquiry and arises from actual notice of circumstances. It exists where the fact in question lies open to knowledge of the party so that the exercise of reasonable observation and watchfulness would not fail to apprise him of it, although no one has told him in so many words. Black's Law Dictionary, 5th Ed. (1979).

The law imputes knowledge when opportunity and interest coupled with reasonable care would necessarily impart it. U.S. v. Shelby Iron Co., 273 U.S. 571 (1926). In Nettles v. Childs, 100 F. 2d 952 (1939), the court cited the holding in U.S. v. Shelby Iron Co., and added

> and if a person has actual knowledge of facts which would lead an ordinarily prudent man to make further investigation, the duty to make inquiry arises and the person is charged with knowledge of the facts which inquiry would have disclosed.

Notice of a fact may exist without actual notice thereof and may be imputed by reason of knowledge of facts or circumstances which place the person having such knowledge upon inquiry which if pursued would have led to knowledge of the ultimate fact in question, Mossler Acceptance Co. v. Johnson, 109 F. Supp. 157 (1952).

Similarly in McDonald v. Robertson, 104 F. 2d 845 (1939): "Knowledge of facts putting a person of ordinary knowledge on inquiry is the equivalent of actual knowledge, and if one has sufficient information to lead him to a fact, he is deemed conversant therewith and laches is chargeable to him if he fails to use the facts putting him on notice." See also American Insurance Co., v. Lucas,

387 F. Supp. 896 (1941): "The doctrine of implied notice or knowledge charges a person with notice of everything that he could have learned by inquiry, if there is sufficient notice to put him on guard and excite attention."

It can hardly be doubted that W[redacted] was aware, or at least on notice, in 1959 of his loss of United States citizenship status. Appellant performed the most unambiguous act of expatriation -- execution of a formal oath of renunciation of United States citizenship on November 17, 1959, before a consular officer of the United States at Melbourne, Australia, in the form prescribed by the Secretary of State. Appellant does not contend that he did not subscribe to that oath or that the manner of performing the act was not in conformity with law, and in the form prescribed by the Secretary of State. Nor has he alleged that he was not competent to perform the act or to comprehend its meaning and its consequences. Appellant's contention that he signed the oath because he had been forced into doing so by the consul, and therefore that the oath was involuntary, is not germane to our immediate analysis. Appellant consciously performed a statutory act of expatriation which on its face was valid. Whether he performed it voluntarily or involuntarily is a question we will reach only if we find that his appeal was filed within a reasonable time.

In 1959, three months before the Department approved the certificate of loss of nationality in his name, appellant, by his own act -- not the Department's --, effectively expatriated himself. As the Attorney General held in his opinion in the citizenship case of Claude Cartier (note 8 supra):

> Cartier lost his nationality not as the result of any action of the Department of State, but directly by virtue of his own act of renunciation. Section 349(a)(6), 8 U.S.C. 1481(a)(6). The subsequent proceedings of the Department of State were merely in the nature of reports, which, in the case of renunciation, are purely ministerial.

Thus, armed with facts which should have put him on his guard, W[redacted] had a responsibility to ascertain

his actual citizenship status, regardless of any alleged lack of actual notice of the Department's ministerial confirmation of his expatriative act. There is no evidence that he used the diligence of a reasonably prudent person to clarify his citizenship status. Twenty-two years elapsed before he asserted a claim to American citizenship.

Appellant's words and conduct subsequent to his formal renunciation in 1959 manifest an awareness -- and acceptance -- of loss of his citizenship. He stated in the affidavit he executed in June 1981 that he had made many trips to the United States and that his travel to the United States after 1959 had been as a non-U.S. citizen. In the same affidavit he stated that he had considered he had lost his citizenship. In the questionnaire also exectuted in June 1981 to determine his citizenship status, he acknowledged that he travelled to the United States on an Australian passport on non-immigrant visas.

We do not consider that in the circumstances of this case appellant has supported his averment that he has been denied due process on the grounds that he did not receive actual notice that the Department had approved a certificate of loss of nationality in his name -- an issue we consider moot. Appellant's situation is hardly that of one who unwittingly performs a statutory expatriating act, as a consequence of which, unbeknownst to him, official action is taken thereon resulting in his loss of United States citizenship. Appellant failed to assert a claim to United States citizenship until 1981. He may not, in our view, now shelter behind an unproved, and at this late date probably unprovable, allegation that he had never received formal notice of loss of his United States citizenship.

Having concluded that appellant should be deemed to have been on notice from the date of his performance of an expatriating act that he had lost or probably had lost his United States citizenship, and that he failed to act thereafter until 1981 on the basis of such notice, there remains for our consideration the question whether Whitehouse's appeal initiated in November 1981 was taken within a reasonable time.

IV

The question of reasonable time depends, of course, on the facts in the case. Unlike a fixed determinate

limitation, it would not depend upon the fact that a certain period of time has elapsed. As the Department pointed out in its brief, "reasonable time" has been held to mean as soon as circumstances will permit, and with such promptitude as the situation of the parties and the circumstances of the case will allow. In the case of Chesapeake and Ohio Railway v. Martin, 283 U.S. 209 (1931), the Supreme Court said, "what constitutes a reasonable time depends upon the circumstances of a particular case." "Reasonable" means reasonable under the circumstances, and that unnecessary delay, or lengthy delay, should not be tolerated. It does not mean that a party be allowed to determine a time suitable to himself. In re Roney, 139 F. 2d 175, 177 (1943). Nor, as the Department observes, should the term "reasonable time" be interpreted to permit a protracted and unexplained delay which is injurious to another party's rights.

It can hardly be denied that appellant permitted a substantial period of time to elapse before taking an appeal. Appellant has offered no explanation why he did not or could not take an appeal before 1981, other than his unsubstantiated allegation that he did not receive actual notice that the Department in 1960 had approved a certificate of loss of nationality in his name. There is no record that he showed any interest in re-establishing his claim to United States citizenship until 1981.

Appellant did not dispute his loss of United States nationality until he gave notice of appeal to this Board in November 1981, twenty-two years after he formally renounced his United States citizenship. In our view, appellant's failure to take an appeal before 1981 demonstrates convincingly that his delay in seeking an appeal was unreasonable under the circumstances of his case. Whatever interpretation may be given to the term "reasonable time", as used in the regulations, we do not believe that such language contemplated a delay of twenty-one years after the certificate of loss of nationality was issued in 1960.

Furthermore, the passage of time in taking an appeal in this case prejudices the Department's ability to meet its burden of proof. After so long a time facts have become clouded and memories hazy. 11/ It is generally recognized that the principal purpose of a limitation provision is to compel the exercise of a right of action within a reasonable time so as to protect the adverse party against stale and belated appeals that could more easily have been resolved when the recollection of events upon which the appeals are based is fresh in the minds of the parties involved and records are available. Here, the recollection of events is not fresh, and the pertinent records are no longer available.

No good cause having been shown, therefor, the Board is afforded no valid basis to exercise the discretion granted to it by section 7.10 of 22 CFR to enlarge the time for the taking of this appeal. 12/

11/ Appellant's contention in the June 1981 citizenship questionnaire that he had never signed an oath of renunciation at a U.S. Embassy or consulate is illustrative.

12/ Section 7.10, Title 22, Code of Federal Regulations (1981), 22 CFR 7.10, reads in part:

...The Board, for good cause shown, may in its discretion enlarge the time prescribed by this part for the taking of any action.

V

On consideration of the foregoing, we are unable to conclude that the appeal was taken within a reasonable time, as prescribed in the Department's regulations in effect from the inception of this Board in 1967 until revised and amended in November 1979. Accordingly, we find the appeal barred by the lapse of time and not properly before the Board. The appeal is hereby denied.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

James G. Sampas, Member